March 2016

Senator the Hon George Brandis QC
Attorney-General of Australia
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Senate
Parliament House
Canberra ACT 2600
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Dear Mr. Attorney General,

I am writing on behalf of our concerned members at the Chinese Australian Forum (CAF) regarding the Australian Christian Lobby (ACL) call for anti-discrimination laws to be set aside during the same-sex marriage plebiscite debate. The ACL argues that it will be necessary to do so as to facilitate free speech. Regardless of what our thoughts are on "same-sex marriage", suspending anti-discrimination laws presents some problems as to the interpretation of the law and precedent. The CAF is opposed to setting these laws aside.

To put it bluntly s116 of the *Constitution of Australia* already provides strong protections to the right to freedom of religious expression. To quote the Australian Human Rights Commission President Gillian Triggs it is "one of the best-protected rights in Australia because it was entrenched in the Constitution."[1] The provision clearly states the following-

> ***Commonwealth not to legislate in respect of religion***
> *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*[2]

Furthermore the Human Rights Commission supports the *International Covenant on Civil and Political Rights* Article 18 which protects "not only the 'traditional' religious beliefs of the major religions, but also non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."[3]

[1] http://www.smh.com.au/federal-politics/political-news/call-to-suspend-hate-laws-disgraceful-triggs-20160216-gmv5u8.html
[2] http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s116.html
[3] https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/freedom-religion-and-belief

The CAF supports harmonious, fair and researched debates but not the unnecessary vilification of any individual or groups in our society based upon difference which may lead to various forms of distress and harm. Lyle Shelton Managing Director of the ACL clearly stated in their media release that-

> *"None of our arguments vilify or hate and neither should they. The arguments are not the problem. The laws are the problem. In particular, the abuse of the laws and legal processes by activists"*[4]

The CAF would argue that provided there is no vilification then the law as shown under our very own *Constitution* will protect the ACL's right to free speech. The law isn't the problem. Vilifying speeches are. And it remains a problem no matter from whose mouths it were to come from, be it an "activist" or the ACL.

While there are no federal laws against vilification on the basis of sexuality, the *Sex Discrimination Act 1984 (Cth)* clearly prohibits discrimination on the basis of 'sex' under s5 and states as its objective under s3(c) that its purpose is-

> *to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity*[5]

Queensland, NSW, Tasmania and the ACT have made it unlawful to incite hatred on the basis of sexual orientation. The provisions include-

> *Anti-Discrimination Act* 1977 (NSW), pt 3A div 5 ('transgender' vilification), pt 4C div 4 ('homosexuality' vilification);
> *Anti-Discrimination Act 1991* (Qld), s 124A (vilification on grounds of 'sexuality' and 'gender identity');
> *Discrimination Act 1991* (ACT), pt 6 ('sexuality vilification');
> *Anti-Discrimination Act 1998* (Tas), ss3 ('public act' (inciting hatred on the ground of 'sexual orientation')), s19[6]

Another concern of the ACL is the reference made to s29J of the *Public Order Act 1986* UK. In this provision concerning the British stance on freedom of speech the ACL claims that their position is justified by this provision which states-

> *Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*[7]

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[4] http://www.acl.org.au/2016/02/acl-stands-by-calls-for-anti-discrimination-laws-to-be-set-aside-to-allow-free-speech/
[5] http://www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/s3.html
[6] https://www.humanrights.gov.au/publications/section-9-protection-vilification-and-harassment-basis-sexual-orientation-and-sex-andor#fnB212
[7] http://www.legislation.gov.uk/ukpga/1986/64/section/29J

What the ACL has failed to mention is that the same legislation under s4A(1)[8] also states the following-

> *(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he— (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress.*[9]

While s29J protects freedom of speech in the UK it does so under the proviso of s4A that the speech shouldn't harass, alarm, distress, threaten, be abusive or disorderly in behaviour to any individual.

We live in a common law country which is guided by statute law. When a law is created the judges interpret. However when the law is temporarily overridden it raises some questions regarding the notion of the separation of power. The suspension of *habeas corpus* is one example we can think of whereby our normative justice system is unilaterally suspended by a democratically elected government. However such actions only occur in times of war. We clearly are not living under such conditions in relation to this particular plebiscite.

In the famous *Mabo and Ors v Queensland (No 2) (1992)* 175 CLR 1 case Justice Brennan argued against fracturing the "skeleton of principle which gives the body of our law its shape and internal consistency" if legislations or statutes are not in themselves transformed to support a court's interpretation. This is because parliament creates the laws not the courts.

To circumvent existing statutes to appease the ACL is conduct akin to the tyranny of special interest groups whose arbitrary opinions should not fracture the "skeleton of principle which gives the body of our law its shape and internal consistency." As stated earlier if the ACL is not engaging in vilification then in accordance to the law they will have nothing to fear.

If the ACL did manage to set aside the anti-discrimination laws, that would leave open again the argument concerning the repeal of s18C of the *Racial Discrimination Act 1975*. It would also trigger our counter-argument that s18D in *Racial Discrimination Act 1975* and 20C in the *Anti-Discrimination Act 1977 (NSW)* allows ''free speech' to be aired provided that it is a fair report "done reasonably and in good faith, for academic, artistic, scientific or research purposes."

Yours sincerely,

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[8] Inserted by the *Criminal Justice and Public Order Act 1994* UK
[9] http://www.legislation.gov.uk/ukpga/1986/64/section/4